IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL CONFIRMATION CASE No 4 of 2003
with
CRIMINAL APPEAL No 1625 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

BABUBHAI UDESING PARMAR

Appearance:

1. Criminal Confirmation Case No. 4 of 2003
Mr R C Kodekar, A.PUBLIC PROSECUTOR for the applicant
MR MC BAROT for Respondent No. 1
NOTICE SERVED for Respondent No. 1

2. Criminal Appeal No. 1625 of 2003
MR MC BAROT for appellant
Mr R C Kodekar, A.PUBLIC PROSECUTOR for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 02/03/2005

C.A.V. JUDGEMENT

(Per : HON'BLE MR.JUSTICE KSHITIJ R.VYAS)

This confirmation case arises out of the judgment and order of conviction and sentence dated 18.12.2003 passed in Sessions Case No.298/2000 by the learned Joint District Judge, 4th Fast Track Court, Anand. The learned Judge has convicted Babubhai Udesing Parmar, the respondent of Criminal Confirmation Case and appellant of criminal appeal (hereinafter referred to as 'the accused') for offences under section 363, 366, 376 and 302 IPC and has awarded different sentences for the offence punishable under section 366 to suffer five years R.I. and to pay fine of Rupees one thousand, in default to undergo S.I. for 10 days, and for the offence punishable under section 376 (2)(6), R.I. for life and to pay fine of Rupees Five thousand, in default to undergo S.I. for two months, for offence under section 302 IPC, to be hanged till death subject to confirmation by the High Court. The said accused has also filed Criminal Appeal No.1625/2003 challenging the said judgment and order of conviction and sentence passed against him.

2. The prosecution case in brief can be stated as under:

The first informant-Shankar Bhursinh had filed the FIR Exh.22 before PSI, Vidyanagar on 1.7.1998 wherein it was inter alia stated that for the purpose of earning livelihood, he had come with his family to Karamsad town and was doing labour work and was staying opposite Tirupati Petrol Pump. The incident in question happened in the month of July, 1998. The informant, after having his supper was sleeping under a shade. The informant woke up at about 2 a.m. for urinating and at that time his sister Savitaben was sleeping along with other family members. However, when he again woke up at about 4 a.m., he did not find her there. It was raining on that night. The informant woke up all his relatives and all made attempts to search for Savita. Ultimately, on the next day morning deadbody of Savita was found lying on her stomach in the surrounding field belonging to Malabhai and Kanbhai. Her neck was tied with the frock worn by her. Thinking that his sister was alive, the informant went near her and removed the knot and found that she was dead. She was in tongue bitten condition, blood was oozing out from her private part. The informant also found that the knicker worn by her was missing. The informant, thereafter informed his employer about the

incident and thereafter filed complaint before the police.

3. PSI of Karamsad police station, recorded the complaint and after registering the offence, started usual investigation. He made inquest panchnama of the deceased and had also made panchnama of the scene of offence, the clothes and other articles collected from the scene of offence. The dead body of the deceased was sent for post mortem to Shree Krishna Hospital and Medical Research Centre, Karamsad. It appears that PSI one Mr R G Patel of Vidyanagar police station arrested the present accused in connection with CR No.122/97 and also recorded statement of accused on 12.8.2002 wherein he informed about the present incident and gave all details as to how the accused, after committing rape on Savita, committed her murder. Thereafter, the accused also showed the place of incident to PSI Mr Patel. Accordingly Mr Patel prepared panchnama of the scene of offence and recorded statement of the concerned witnesses. He sent the frock worn by the deceased to FORENSIC SCIENCE LABORATORY. It appears that the accused wanted to make confessional statement. Therefore, PSI Mr Patel prepared report at Exh.13. After collecting sufficient materials against the accused, charge sheet was filed before the Learned Judicial Magistrate First Class at Anand, who in turn, committed the case to the Court of Sessions as the offence for which the accused was tried, was being exclusively triable by the Sessions Court.

4. Charge - Exh.4 for the offence punishable under sections 363, 366, 376 and 302 was framed against the accused. The accused pleaded not guilty and claimed to be tried. In the further statement recorded under section 313 of the Criminal Procedure Code, the accused while denying the evidence led against him, has come out with a case that the police after pressurising him, obtained his signature on the confessional statement in the lobby of the Court. According to him, the learned Magistrate had recorded confessional statement in his absence and a false case had been filed against him.

5. Learned trial Judge, after appreciating oral as well as documentary evidence including the confession and the further statement of the accused, recorded his finding that the prosecution had established the charges levelled against the accused beyond reasonable doubt. He, therefore, convicted the accused and passed the sentence as stated above. Hence the present appeal.

6. We have heard Mr M C Barot, learned Advocate appearing for the appellant and Mr R C Kodekar, learned APP appearing for the State. We have also gone through the entire evidence and have minutely examined it with a view to reappreciate it. At the outset, it may be stated that the defence has not challenged the homicidal death of deceased Savita. Dr. Mayur Trivedi, PW 8 at Exh.24, serving as Additional Medical Officer in Shree Krishna Hospital, Karamsad at the relevant time, performed the post mortem of the deceased on 1.7.1998 with Dr.Sunil Bhatt. As per the post mortem examination report, the deceased was strangulated by tying frock around her neck and she died because of strangulation. Prior to it, she was raped also. He has given details about external appearance of the deceased by stating that the deceased had worn a violet coloured frock, five bangles of white metal, was fair-built and nourished, her condition and skin were cold, nails III face was Livid & Eyes Subjunctival, Haemorrhage on either side. State of Natural orifices (Nostrils, mouth, ears, Vagina, Anus & Urethra) Tongue protrude. Vagina torn, tongue bitten, tip protruding etc. He has also noticed the following description of injuries with their duration:

1. Contusion on neck 29.7 x 4.6 cm. Maximum width and 2.1 cms minimum width.
2. Abrasion on posterior aspect of upper third of Rt. forearm, 3.3 x 1.2 cm.
3. Abrasion below Rt. axilla 6.4 x 2.3 cms.
4. Contusion on Rt.hypochrondrisin 8.3 x 3.7 cms.

5.6.7. Three contusion on Rt.Scapular region 3.7 x 1.5 : 3.1 x 1.7 and 2/6 x 1.2 all measurements in cms.

8. Abrasion on Rt.lumber region 12.2 x 5.1 cms.
9. Posterior part of perineum swollen, blood stained and posterior vaginal will torn 3.1 x 0.2 x 0.4 cms.

He has also given description of internal appearance on dissection of the deceased. Dr. Trivedi found congested brain and also found that the lungs of the deceased were congested C/S showing bubbling. He also found the mouth, pharynx & Oesophagus blood stained and her spleen congested. According to Dr. Trivedi, all the injuries were antemortem, injury no.1 being strangulation was possible by cloth, while injury no.9 is possible by rape. Injuries no.2 to 8 were also possible on coming in contact with hard substance. Dr.Trivedi opined that the cause of death was Asphyxia due to strangulation. He has also opined that the time of death was 24 hrs. of 30.6.1998.

7. Dr Trivedi was cross-examined by defence.

However, nothing substantial has come out. Thus, in view of the medical evidence, it is clear that the deceased died homicidal death due to strangulation.

8. Shankarbhai Bhursingh, PW 6, brother of the deceased has given evidence at Exh.21. He has stated that for the purpose of earning livelihood, he and his family were doing labour work and were residing near Tirupati Petrol Pump, that in the month of July, after the days work, and after having their meals, they slept under the shade, he did not find his sister Savita when he woke up at 4 a.m. to answer the call of nature. He and his family, thereafter made all attempts to search Savitaben on that rainy night. Ultimately, on the next day the dead body of Savitaben was found near the fence of the field of Malabhai and Kanbhai, lying on her stomach. Her frock was tied around her neck and she was in naked condition. He has also noticed that the knicker put on by her was missing. He also found that blood was coming out from her private part. He felt that rape was committed by someone and accordingly lodged the FIR. Revliben, wife of the informant, PW 7 at Exh.23, has also given similar version in her evidence.

9. Mr M C Barot, learned Advocate appearing for the accused has not seriously challenged the evidence of PW 6 as well as PW 7. From their evidence the prosecution has established that the girl of tender age was kidnapped and done to death after being subjected to rape. Medical evidence on record also supports the ocular version of PWs 6 and 7.

10. The prosecution, for the purpose of establishing the involvement of the accused in the commission of the offence, has heavily relied on the confessional statement given by the accused which was recorded by the learned Magistrate under section 164 of the Criminal Procedure Code. Mr Barot has contended that no reliance can be placed on the confession alleged to have been made by the accused. According to him, the learned Magistrate has not followed the procedure which is required to be followed for the purpose of recording statement under section 164 of the Criminal Procedure Code, 1973 (for short, 'the Code') and has followed procedure which was not required to be followed. He submitted that the statement was recorded by administering oath, whereby the learned Magistrate has pinned down the accused to make the statement in a particular manner. It was, therefore, submitted that the confession was not by free will. Mr Barot also submitted that in absence of any corroboration to substantiate the alleged confession of the accused, no

order of conviction can be passed solely on the basis of so-called confession of the accused.

11. Mr Barot has also submitted that there is nothing on record to show that the accused had come from the judicial custody before being brought before the Magistrate. Submission of the learned Advocate is that as the accused was brought by police, there was possibility of the accused being pressurised to make the confession and such dictum cannot be ruled out. It was therefore, submitted that the confession of the accused recorded by the learned Magistrate, was not free from doubt. To substantiate his submission, the learned Advocate for the accused relied upon the following decisions:

1. AIR 1978 SC 1544 - Devendra Prasad Tiwari v. State of U.P.

2. AIR 2004 SC 4197 - Parmananda Pegu v. State of Assam.

3. 1987 (3) Crimes 169 - Akanman Bora v. State of Assam

4. 1980 Cri.L.J. 171 - Philips v. State of Karnataka.

12. Mr R C Kodekar, learned APP, on the other hand, by inviting our attention to evidence of PW 2-Mr A R Patel, the learned Magistrate, submitted that the learned Magistrate has scrupulously followed the provisions of section 281 of the Code, while recording the confession under section 164 of the Code and in any case, in absence of any prejudice having been caused to the accused, it is submitted that the learned trial Judge has rightly relied on the confession of the accused recorded on oath.

12.1. Section 164 of the Code deals with recording of confessional statement. On a plain reading of section 164 of the of the Code, it is clear that before acting on a confession made before a Judicial Magistrate, the court must be satisfied first that the procedural requirement laid down under sub-section 2 to 4 thereof are complied with. These are solid safeguards to ensure that confessions are made voluntarily by the accused after being apprised of the implications of such confessions.

13. Section 281 of the Code deals with record of

examination of the accused requiring the Magistrate to follow the procedure while examining the accused before him. Para 34 of the Criminal Manual is also relevant for this purpose which reads as under:

> "Following instructions are issued for the guidance of the Magistrate recording confessional statement under section 164 of the Code. They are not intended to be given by the law to the Magistrate. The only object with which they are issued is to indicate in general the manner in which the discretion may be exercised."

14. The above provisions give sufficient guidelines to the Magistrate to record confession and statements of the accused. While exercising the discretion, the learned Magistrate has to scrupulously follow the provisions of section 164 as well as the procedure under section 281 of the Code.

15. Mr A R Patel, PW 2 Exh.12, in his evidence has stated that at the relevant point of time, he was serving as Civil Judge (JD) and Judicial Magistrate First Class, Anand between 1.8.2000 and 10.6.2002. He was holding charge of another Civil Judge, Shri Lathia who was on leave on 24.8.2000. Where PSI Mr R G Patel produced the accused before him in connection with the offence committed under provisions of section 302, this witness sent the accused to the judicial custody. On the same day, PSI, Mr Patel gave application stating that the accused wanted to confess about 7 to 8 offences committed by him and also his involvement in the offence registered as CR 117/98. It may be stated at this stage that with respect to the present case, the offence was registered as CR No.117/98. The learned Magistrate, on the same day, passed an order on the application exh.13 granting permission to PSI, Vidyanagar police station to produce the accused for the purpose of recording confessional statement under section 164 of the Code. On the next day, i.e. on 25.8.2000, the date was fixed for the purpose of recording the confession and the accused was produced before the learned Magistrate. It was deposed by the witness that as the concerned Magistrate Mr Lathia had joined his duties, the accused was produced before him. Mr Lathia while granting time and fixed the date of 29.8.2000 for the purpose of recording confession, ensured that police party was kept out. He also called the accused in the chamber and asked him whether he was keen to give voluntary confession. The accused was also explained that confession would be used in evidence against him. Mr Lathia also granted time to consider his

decision and fixed the date of 29.8.2000. On 29.8.2000 again Mr Lathia had gone on leave. The accused was therefore, produced before Mr A R Patel. PSI MR Patel was asked to produce the accused at 13.45 hours. The accused was informed by this witness that he was not bound to give confessional statement. He was also informed that he was not in police custody but in judicial custody. The witness has also deposed that the accused remained under fear of police and, therefore, he was further granted time to consider his decision and fixed the date of 31.8.2000. Exh.14 is the order passed by this witness. It is mentioned therein that the accused was produced under police escort at 13.45 hours and was asked to stand in the witness box. Police party was sent out of the court. The accused was asked whether he was prepared to give voluntary confession. The accused answered in affirmative by nodding his head down. The accused was asked since when he was in police custody, to which he replied that since 8.8.2000 by looking all around the court room. He was assured that he was not in the police custody but in the custody of the Magistrate. Even though the accused was granted time to reconsider his decision, as he remained under fear of police, the learned Magistrate opined that the accused deserved some more time so that he can came out of the fear and influence/impression of police custody and could freely confess. He accordingly gave next date of 31.8.2000. The accused was thereafter produced on 7.9.2000 before Mr Patel. At that time, besides the learned Magistrate, his board clerk Mr Bhatt, his peon Kantibhai Chauhan were there. This witness has specifically stated that the accused was produced before him by Police Constables Shankarbhai Gema and Ganesh Punjabhai. After taking the custody, the accused was kept in the custody of his peon Kantibhai. The police party was asked to leave the court. After being satisfied that the police party left the court, the learned Magistrate started recording the statement of the accused. Initially the accused was asked questions as per the requirement of Criminal Manual. The accused was informed that he was going to give the confession and the confession would be used against him in evidence, that the accused was not in police custody but in the custody of the Magistrate. The accused was asked about the relation with the police, and also whether the accused was making the confession due to any temptation or coercion. The answer given by the accused were recorded by the witness. On being satisfied with the answers given by the accused, as per the procedure prescribed under section 281 and para 34 of Form No.35 of the Criminal Manual, the confession was recorded by

administering oath. According to this witness, the entire confession was taken verbatim and was subsequently read over to him. On every page his signature was obtained. The accused also put his signature below the confession. Thereafter, the Magistrate put his signature. Thereafter the accused was sent to sub-jail with police escorts. Exh.16 is the confession recorded by this witness wherein he has admitted that the incident had taken place two years back. He was not remembering the exact date. The accused was at his residence. At about 12 midnight, he had gone to Tirupati Petrol Pump, Karamsad. Opposite the said petrol pump there was a thrashing ground. He did not know who was the owner of the thrashing ground. He saw a girl lying there. He did not know her age. He lifted the girl. She started shouting. The accused shut her mouth with hands. He thereafter took her to a field through a narrow lane. In the field there was a babul tree on which there was a bird's nest. After taking the girl there, he removed her clothes and committed rape after gagging her mouth. After committing rape, he strangulated her neck with her frock, as a result of it, the girl died. He strangulated her at the corner of the fence and after leaving her there he left the place.

16. This witness has also introduced himself by giving his designation. He also identified the accused sitting in the court as the person who was produced before him and whose confession was recorded by him.

16.1. In the cross-examination, this witness has stated that he has made note of the procedure carried out by him while recording the confession in Exhs. 13, 14 and 16.He has not made note of the procedure not carried out by him. He has stated that he has recorded confession as per the provisions of sections 164 and 281 of the Code and as per the requirement of the Criminal Manual. He has further stated that when the accused was produced before him on 24.8.2000 for one offence, report was submitted to him that the accused wanted to confess with respect to the other offences too. He has admitted that along with report Exh.13, he has not given the statement of the accused as well as other record pertaining to his admission. It is stated by him that after going through Exh.13, permission to record statement of the accused was given. He has admitted that he started recording the confessional statement at 11.15 am on 7.9.2000 and completed it at 11.30 a.m. on the same day. He has also recorded confession of the accused with respect to CR No.221/98 which was completed at 11.45 am. He has also stated that at the time of confession, he has not offered

legal aid to the accused. He has admitted that he has not mentioned in Exh.16 about the fact that out of fear the accused has given confessional statement. He offered protection to the accused against the misbehaviour and torturing by the police. However, he has made a note that the accused was sent to judicial custody. He has also suggested to the accused that on his failure to give confession, he would not be sent to the police custody. He has also admitted that while recording confession Exh.16 he has not mentioned the time of production of the accused nor mentioned time of the question and answer session. After recording the question answers, he has recorded name and address of the accused and thereafter administered oath and recorded the confession. The witness who stated that he did not examine the physical condition of the accused, but he has explained that as the accused was produced from judicial custody and he had not made any complaint against the police, physical condition of the accused was not examined. He has also stated that he did not carry out any medical check up of the accused. The witness has admitted that the accused was produced with police escort and was also sent under police escort. This witness has specifically denied the suggestion that confession exh.16 was recorded on the basis of previous confession.

16.2. After closely examining the evidence of this witness we are of the opinion that he has scrupulously followed the legal procedure while recording the confession. Instead of becoming over-enthusiastic in recording the statement, on 24.8.2000 itself when he was holding the charge of the concerned Magistrate, he postponed it till the next day i.e. on 25.8.2000. When the accused was produced on 25.8.2000 before the concerned Magistrate Mr Lathia, he had also adjourned the case to 29.8.2000 to enable the accused to think about the consequence of confession. When the accused was produced on 29.8.2000 before this witness, as Mr Lathia was on leave, he had specifically told the accused that he was not bound to make statement and that he was not in police custody but in judicial custody. Not only that but this witness felt that the accused was under the fear of police and, therefore, he granted some more time to think and kept the matter on 31.8.2000 vide the order passed by the learned Chief Judicial Magistrate, Nadiad at Exh.15, this witness was specifically asked to record confessional statement. This witness fixed 7.9.2000 as the next date for recording confession. The aforesaid facts did reveal that the accused was granted sufficient time to think before making the confessional statement. Even on 7.9.2000, when the accused was produced before

this witness, he ordered the police to leave the Court room and kept the accused in the custody of the court peon Kantibhai. He followed the legal procedure by asking preliminary questions to the effect that the accused was not bound to make confession and that the confession could be used against him in evidence and that he was not in the police custody but in the custody of the Magistrate and about his relations with the police and whether he was making the statement for some gain or under pressure. On being fully satisfied with the reply given by the accused, the witness started recording the confession. Once we are satisfied that the confession was legal and voluntary, it is not possible for us to accept the submission of the learned Advocate for the accused that no reliance can be placed on the confession of the accused, as according to him, the learned Magistrate has not followed the procedure required to be followed and that the confession was not by free-will of the accused. It is also not possible for us to accept the submission that the confessional statement recorded by the learned Magistrate requires no consideration as there is nothing on record to show that the accused had come from the police custody when he was brought before the Magistrate. This witness Mr Patel in his examination-in-chief, has clearly stated that when the accused was produced before him on 24.8.2000 by PSI Mr R G Patel, he was sent to judicial custody. In the cross examination he has stated that as the accused was produced from the judicial custody and as he was not told about any ill-treatment meted out to the accused by the police, he did not enquire about the same from the accused. Thus, it is clear that the accused was produced before this witness from judicial custody. Merely because the accused was produced with police escort, by that fact itself, it cannot be concluded that the accused was in police custody. In view thereof, it is not possible for us to accept the submission of the learned advocate for the accused that the accused was pressurised to make the confession.

17. From the evidence of PW 2-A R Patel, it is also clear that he has scrupulously followed the procedure laid down under section 281 of the Code and para 34 of the Criminal Manual while recording the statement of the accused under section 164 of the Code. We have, therefore, no hesitation to hold that the accused made statement before the learned Magistrate of his own volition without there being any pressure or coercion. We therefore, reject the submission advanced on behalf of the accused that the learned Magistrate has not followed the procedure required to be followed for the purpose of

recording statement under section 164 of the Code.

18. A grievance was made on behalf of the accused that by recording statement by administering oath the learned Magistrate has pinned down the accused to make the statement in a particular manner and therefore, the alleged confession was not by free-will. In support of this, learned Advocate for the accused placed reliance on certain decisions as stated above in para 11 which are discussed by us in the following paragraphs:

18.1. In the case reported in 1987 (3) Crimes 169 Akanman Bora v. State of Assam (supra), the Gauhati High Court held that confession should be recorded in the manner provided for recording statement of an accused/suspect and not in the manner provided for recording evidence. If it is recorded in the manner provided for recording evidence by administering oath, then it loses its character insofar the maker is concerned. The fact of administering oath at the recording of confession virtually means that the maker is compelled to give evidence against him, placing him in the status of a witness at the stage of investigation in violation of Article 20(3) of the Constitution of India read with sub-section 5 of section 164 of the Code of criminal Procedure. Administering oath for recording confession will only mean the recording of evidence of the maker for use in subsequent stage against the maker and which is prohibited in law. Such confession is bad in law, and is inadmissible in evidence.

18.2. In the case reported in 1980 Cri.L.J. 171 Philips v. State of Karnataka (supra), the Karnataka High Court has expressed the same view. It was held that there is no provision for administering oath to an accused who is making a confessional statement before a Magistrate. When this specific provision is made, the other provisions of the Indian Evidence Act etc. regarding recording of statements will not operate. Therefore, no question of administering oath arises, and in fact if oath is administered, it will be contrary to the provisions of Section 281 of the Code and is an illegality and such confessional statement looses its evidentiary value. It is further held that the object behind this provision viz. Section 164 (4) of the Code is clear on the face of it. The concerned accused should not be made to feel that he is bound down to a particular statement, and if he later stated something contrary to that, he would be incurring the wrath of law.

19. We have carefully gone through the above decisions. We have a different viewpoint to express. We may therefore, again turn our attention to the provisions of section 164 of the Criminal Procedure Code. Section 164 of the Code is divided into six sub-sections. Sub-section (1) authorises any Metropolitan Magistrate or Judicial Magistrate to record confession or statement irrespective of whether he has jurisdiction to try the case. Sub-section (2) deals with duty of such Magistrate to explain the person desiring to make the confession that he is not bound to make it and also to caution him that such confession may be used against him. Sub-section (3) prohibits the Magistrate to remand that person to police custody if he later expresses his unwillingness to make confession. Sub-section (4) deals with the manner in which confession is to be recorded and hence it is reproduced wholly:

> (4) Any such confession shall be recorded in the manner in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect -
>
> "I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.
>
> (signed) A.B.
>
> Magistrate"

Sub-section (5) authorises Magistrate to record statement (other than confession) on oath. Sub-section (6) directs that the Magistrate recording the confession or statement under this section to the Magistrate by whom the case is to be inquired into or tried. While introducing sub-section (5) in section 164, to expressly provide for administration of oath to a person whose statement is recorded, the Law Commissioners in 37th Report him as observed as under:

> "The position regarding administration of oath to a witness is recorded under section 164 has been

> considered by us. The conflict of decisions on the subject has been discussed in detail in our Report on the Oaths Act (28th Report (Oaths Act)Pages 29, 30). The question now arises is, what ought to be the law. On the one hand, if a witness whose statement is recorded is to be encouraged to speak the truth, an oath is desirable. On the other hand, our attention was drawn to the view expressed by MR L C Crump (Mr Crump was a District and Sessions Judge at that time. He later became Judge of Bombay High Court) (While the bill which led to the 1923 witness who is examined under section 164 should not be liable for perjury, was the consideration that the police would (if he is to be made so liable) be able to compel a person too adhere too a statement which he may have made at their instance under compulsion, on pain of prosecution for perjury. We however think, that on principle there is something to be said for recording the statement of oath, to lend it some sanctity. We recommend an amendment of section 164 to provide that the statements of witnesses should be on oath".

Thus it is clear that to encourage such person to tell the truth and to lend some sanctity to the statement provision of sub-section (5) has been introduced.

19.1. So far as confession is concerned it is not covered under that sub-section. However, it is well defined principle of law that before a confession is accepted and used against the maker of it, the court must be satisfied that it was voluntary and was true account of the statement given by the accused. Even sub-section (4) requires a Magistrate to make a memorandum at the foot of the confessional statement that it contains full and true account of the statement made by the accused. Thus what is contemplated by the legislature is that, whether it is confession made by the accused or statement given by the witness, it has to be true and should reveal correct facts of the case. The accused or the witness as the case may be, is expected to tell the truth under section 164 of the Code. The confession, whether on oath or otherwise, if found to be untrue, the court can reject it and refuse to admit it in evidence. Further section 164 provides several important safeguards, as contained in sub-sections (2) (3) and (4) to protect the accused making confession, which are not available to the witness whose statement is recorded under section 164 of the Criminal Procedure Code. For the confession of accused

the legislature has laid complete emphasis on the aspects of voluntary, truthful and 'caution'. Moreover the accused, normally, is not required to give evidence on oath at the trial, unless he chooses to do so at the time he is asked under section 313 of the Code whether he would like to give evidence on oath. Therefore, the apprehension expressed by Mr L C Crump has no scope because the accused is not exposed to any compulsion from the police or to any prosecution for perjury even when his confession is recorded on oath and it is subsequently retracted by him. Hence the underlying idea of section 164 appears to be that the confession should be voluntary, true and made after fully realising its implications. It is, therefore, clear that when the confession is found to be true, voluntary and is found to have been made after administering due caution, all the ingredients of section 164 stand satisfied.

19.2. So far recording of the confession is concerned, as already stated above, sub-section (4) provides that the it has to be recorded in the manner prescribed under section 281 of the Criminal Procedure Code. It reads as under:

"281. Record of examination of accused - (1) whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the court and such memorandum shall be signed by the Magistrate and shall form part of the record.

(2) Whenever the accused is examined by any Magistrate other than Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the court appointed by him in this behalf.

(3) The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the court.

(4) The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be

interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(5) I shall thereafter be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(6) Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial."

These provisions show that section 281 does not prescribe administration of oath to the accused who is to make confession before the Magistrate nor does it impose any specific prohibition thereon. Of course section 164 (5) authorises the Magistrate to record only the statement (other than confession) on oath under certain circumstances and hence administration of oath can be considered as irregularity committed in following the above provisions. The court is, therefore, required to find out and satisfy itself that the confession is in compliance of section 164 and it is recorded in the manner prescribed under section 281 of the Code. Non-observance of requirements of these sections may result in having the statements or confession ruled out of evidence. The legislature has, however, enacted section 463 in order to see that technicalities may not succeed in defeating the ends of justice. Section 463 can be reproduced as under:

"463. (1) Non-compliance with provisions of section 164 or section 281 - If any court before which a confession or other statement of an accused person recorded, or purporting to be recorded under section 164 or section 281 is tendered, or has been received, in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it may, notwithstanding anything contained in section 91 of the Indian Evidence Act, 1872, take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded admit such statement."

(2) The provisions of this section apply to Courts of appeal, reference and revision."

This section, therefore, provides that if there is non-compliance of either section 164 or section 281, the court after taking the evidence in regard to such non-compliance is satisfied that it has not injured the defence of the accused on merits and he duly made the statement recorded, it can act upon it.

20. In the present case, non-compliance is in the manner of recording the confession since it is recorded on oath. Though strictly speaking, it cannot be covered under section 463 of the Code, because there is no non-compliance of any of the provisions of either section 164 or section 281 of the Code. The only defect is that it is recorded on oath. Such provision is not there in either of the sections. To that extent it can be considered as an irregularity. However, it is required to be seen whether in the instant case, this irregularity i.e. administering oath has rendered the confession inadmissible in evidence. First we will have to see the nature of the irregularity or the non-compliance, whether it is curable or incurable.

It may be noted here that certain legislative changes have been made in section 463 while enacting the Criminal Procedure Code of 1973. This section corresponds to section 533 of the old Code of 1898. The words "take evidence that such person duly made the statement recorded" appearing in the old sub-section (1) have been deleted and the words "take evidence in regard to such non-compliance"have been inserted. The Law Commissioners' in 41st Report observed:

"45.6. Section 533 provides that if the court before which a statement or confession of the accused purported to be recorded under section 164 or section 364 is tendered in evidence finds that any of the provisions of such sections has not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded. This expression seems to have created some difficulty in interpretation as is evidenced by the conflicting decision of the various courts.

One has to distinguish between two questions, (i) whether the confession or other statement was "duly made" that is to say, made after giving the

necessary warning and after putting the required questions under section 164, and (ii) whether the confession or other statement, duly made, was properly recorded.

In the first case, section 533 should not apply, because to apply the section in such cases would defeat the very object of sections 164 and 364, thereby depriving the accused of a beneficial provision on a matter on which the law has always shown is anxious concern. It is only the second kind of defect-defect in recording-that should be curable."

The Magistrate should have complied with the substantial provisions of section 164, and there can be no saving far a non-compliance on that account. If such compliance is not apparent from the record, it can be proved otherwise. That is all that Section 533 is intended to provide for.

45.7. We, therefore, recommend that sub-section (1) of section 533 be amended to clarify that the evidence given should relate to the apparent non-compliance with the statutory provisions."

[emphasis supplied]

This shows that not every kind of defect is incurable. The Magistrate is expected to strictly comply with section 164 and he cannot take any liberty with the same. Any non-compliance of section 164 will render confession inadmissible in evidence.

As stated above, the evidence of the learned Magistrate, which is taken on the aspect of recording of the confession under section 164 of the Criminal Procedure Code of the accused clearly shows it was "duly made", that is to say after giving the necessary warning and after putting the required questions under section 164. The Magistrate has also found it to be true and accordingly he has certified to be so. There is, therefore, no defect in following this procedure. Had there been any defect in this procedure, it would have rendered the confession inadmissible because such defect is incurable. It is on the second question i.e. in the manner of recording that the learned Magistrate has done something more which is not prescribed either under section 164 or 281 of the Criminal Procedure Code. However, if the confessional statement of the accused at Exh.16 is carefully perused, it shows that it is recorded in Form No.35. Form no.35 can be divided into three

parts. The first part relates to putting questions to the concerned accused to:

(i) ascertain whether he knows that he is not bound to make such statement, if he did not know, to inform him that he is not bound to do so;

(ii) to warn him what are the implications of the confessional statement and the confessional statement that may be made by him can be used against him in a judicial proceeding and,

(iii) to ascertain whether he is free from any influence of the police and he is willing to make confession without being influenced by any external factors or that it is not as a result of any threat, coercion or inducement.

The second part relates to the text of the confession. The third part is the certificate of the Magistrate. In this case, he has expressed his satisfaction that the confession was made after due warning, it was voluntary and it was true account of the statements made by the accused.

Exh.16 shows that first part which revolves around section 164 of the Criminal Procedure Code has been scrupulously complied with; and only after he is completely satisfied that accused is making it voluntarily even after administering of caution that the learned Magistrate has noted name of the accused and proceeded to record the text of the confession. It is at this stage, Exh.16 shows that it is made on oath.

21. From the discussion made in the foregoing paragraphs, it is clear that in the present case, the confession is not only found to be true by the court but it is found to be voluntary, made after due cautioning and hence it is in full compliance of section 164. The additional measure of administering oath, which is not required in law, has been taken in the process of recording the confession and whatever the impropriety, it is in the manner of recording of the confessional statement which can fall in the category of question (2) of Law Commission's report. It is a defect in form and not a defect in substance. Such defect is curable. It is also found that except for administering the oath the confession has been recorded in accordance with all the ingredients of section 281 and the section stands adequately complied with.

21.1. It is now to be seen whether administration of

oath while recording confession would amount to 'pinning down the accused' or compelling him to give evidence against him which can be violative of Article 20(3) of the Constitution of India or it may give a cause to the accused to entertain an apprehension that if he retracted from the confession, he would incur the wrath of law, as laid down by the decisions cited by Mr Barot.

22. It may be noted here that the entire concept of admissibility of confession in evidence is based on its voluntary nature. The Magistrate has to first find out whether it is voluntary and free from the influence of any external factors and if he found it to be so, he should commence recording of it. Slightest amount of compulsion, threat, duress or inducement would render it totally inadmissible in evidence. It, therefore, cannot be said that if the confession is recorded on oath it amounts to compelling the accused to give evidence against himself, which can be violative of Article 20 (3) of the Constitution of India.

22.1. Further before recording the statement, the learned Magistrate is required to explain to the accused very clearly that he is not bound to make any confession but if he does make any confession, it may be used against him in evidence. The learned Magistrate has also to certify in writing that he had explained to the accused in aforesaid terms. Even after recording of confession is complete, it is to be read over to him and he is to be given a chance to add or to render any explanation to the answers given by him. Thus, it is made very clear to the accused that it is absolutely his choice whether to give confessional statement and nothing compels him to do so, meaning thereby he is also to be explained that no law binds him to make confession. In our opinion, therefore, mere administration of oath at the time of recording the confessional statement of the accused cannot amount to 'pinning him down'.

23. Moreover, occasion to use the confession arises only at the time of trial and the accused can retract the confessional statement, in an indirect manner at the time when his plea is recorded by not pleading guilty or in a direct manner when his statement under section 313 of the Criminal Procedure Code is recorded. When the accused is being tried for any offence, say, under section 302, it is obvious that he will have the services of an Advocate of his own choice and if it is not so, the Government will provide him with legal assistance or the court may appoint any Advocate to act as amicus curiae. During the

trial, legal advice is always available to him and therefore, there is no possibility of his entertaining the apprehension that he would be incurring the wrath of law, if he retracted from his confession. We, therefore, respectfully disagree with the view expressed in the decisions cited by Mr Barot.

23.1. Now we will examine whether administration of oath has injured the accused in his defence on merits. If it has done so, it will render the confession inadmissible in evidence. Confession is an admission of the offence by a person charged with the commission of it. Therefore, first we will discuss law on confession as laid down by the Apex Court.

24. In the case of Devendra Prasad Tiwari vs. State of U.P. (supra has laid down that

> "for judging the reliability of a confession, the court should carefully examine it and compare it with rest of the evidence in light of the surrounding circumstances and probabilities of the case."

Further in the decision rendered in the case of Chandrakant C Desai v. State of Gujarat, (1991 SC (Cri) 153, after following Kashmira Singh v. State of M.P., AIR 1952 SC 159, in para 5, the Apex Court has decided as under:

> "The confession of accused 1 was retracted at the time when the accused was questioned under section 313. In considering the reliability of this confessional statement, the High Court had not kept in view the observations of this court in Kashmira Singh vs. State of M.P. In this decision, the Supreme Court had observed:
>
> "The confession of an accused person is not evidence in the ordinary sense of the term as defined in section 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course, it is not necessary to call the confession in aid. But cases may

arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

In the decision rendered in the case of K L Pavunny v. Asstt.Collector (HQ) Central Excise Collectorate, Cochin reported in (1997) 3 SCC 721, has laid down that confessional statement, although subsequently retracted, if on facts found form the exclusive basis of the conviction, it is not necessary that each detail in the retracted confession be corroborated by independent evidence. However, the Apex Court has also said that it is a rule of prudence and practice that court seeks assurance from other facts and circumstances to corroborate the retracted confession.

24.1. These decisions would show that the Apex Court has often said that court should not base conviction solely on the retracted confession of the accused but should look for corroboration. In the case of Chandrakant Desai (supra), it has even said that the court should first marshal the evidence against the accused excluding the confession altogether from consideration. It has to be brought in aid only after the court marshal the evidence, which would, if believed, be sufficient to base conviction but it prepared to accept it without the aid of confession.

24.2. Thus the court cannot solely rely on the confession and make it a foundation for convicting the accused. Therefore, before placing reliance on the confession, the prosecution is required to establish other circumstances involving the accused in the crime; only thereafter it can bank upon the confession. If this is the position of Law, in our opinion, a defect in recording of the confession has little scope to adversely affect the other part of the evidence led by the prosecution.

24.3. Further when the accused challenges the confession on the ground of it being defective, it is for him to at least show, if not conclusively establish that the non-compliance has injured him in his defence on the merits. In the instant case, though certain questions have been put to the witness on the aspect of

administering oath to the accused while recording his confession, no effort whatsoever has made to show how it has injured him in his defence on the merits. The other circumstances led by the prosecution have remained unaffected despite the irregularity, as we will presently discuss.

Thus, while keeping the confessional statement of the accused aside, let us examine the circumstances used against the accused.

25. The case on hand is based on circumstantial evidence. From the evidence of the informant Shankarbhai Bhursinh coupled with the evidence of PW 7-Revliben and PW 4 Poonambhai, PW 5 Ramanbhai, it is clear that deceased Savita died in unnatural homicidal death. These witnesses have given details about the place where the dead body of the deceased was found. Place of the offence is duly established from the panchnama Exh.8. From panchnama Exh.8 it is clear that the incident had taken place in a field near Tirupati petrol pump. It was contended on behalf of the accused that panchnama Exh.8 of the scene of offence is not proved as panch Mohanbhai Shanabhai does not show the place of the incident. Not only that but the second panch Jayantibhai has not supported the prosecution as he was declared hostile. It is not possible for us to accept this submission. Panchnama Exh.8 of the scene of offence is duly corroborated by inquest panchnama Exh.10 and the same has not been challenged by the accused. Thus, on reading the complaint Exh.22 together with panchnamas Exh.8 and 10, it is clear that all the details of scene of offence are given. Apart from that, from the evidence of Dr.Mayur Trivedi at Exh.24, the prosecution has established rape having been committed on the deceased Savita. Thus, medical evidence also corroborates the say of informant Shankarbhai, prosecution witnesses Revliben, Ramanbhai and Poonambhai. As stated above, these witnesses have clearly stated in their evidence that the dead body of the deceased was found in naked condition. Dr.Trivedi has clearly opined after examining the private part of the deceased that injury no.9 confirmed the fact of deceased being subjected to rape. Medical certificate Exh.21 clearly reveals that the probable cause of death is strangulation and rape. In fact, the defence has not seriously challenged the medical evidence. From the Forensic Science Laboratory report Exh.42, the prosecution, in the present case, has established that vaginal swab smear, hair, nail and saliva of the deceased contained blood having AB group. The prosecution has

also collected sample of blood from suspicious persons. From the report Exhs 42 and 55 of the Forensic Science Laboratory, it is clear that the blood group of those persons was 'B'. The prosecution in the instant case has also established that the deceased died due to strangulation with the help of the violet coloured frock worn by her. Forensic Science Laboratory report Exh.50 mentions the violet coloured frock which is in conformity with the evidence of Dr.Trivedi Exh.24. Over and above the aforesaid circumstances, the prosecution has also successfully established the modus operandi adopted by the accused in other cases. From the record of the case, it appears that the accused is also involved in other similar cases. Vidyanagar police station has registered cases bearing C.R. No.127/97 on 6.8.1997, C.R. No. 48/97 on 7.3.1997, C.R. No.85/98 on 3.5.1998, C.R. No.221/98 on 2.7.1998, C.R. No.128/98 on 17.8.1998 and CR No.122/97 on 5.8.1997. From the aforesaid, it appears that the accused is involved in committing a series of rapes as well as murders. All these offences except two have taken place between July and August during rainy season. Except in one offence, the victims were all women while in one case a minor child became the victim at the hands of the accused. As stated above, the modus operandi is almost same in all the offences inasmuch as the accused, after committing rape, used to throttle neck with clothes put on by the victim. All these incidents have taken place at or around Karamsad town. Thus the place, time and the manner in which the offence have taken place and the victims, all are almost same and identical. In view of this, it can well be described the accused as a sex maniac or a sexually disoriented and perverse person. Though the first incident had taken place on 6.8.1997, the accused was arrested in August, 2000. From that day onwards, all the misdeeds committed by the accused in the past have come on surface.

26. The aforesaid circumstances, in our opinion, if considered independently, are sufficient to involve the accused in the offences in question. These circumstances, if read together with the confession of the accused, leave no manner of doubt about the involvement of the accused in the offences for which he was charged. Taking into consideration the above aspects of the matter, we are in total agreement with the findings recorded by the learned trial Judge that the prosecution has established the charges levelled against the accused beyond reasonable doubt. In that view of the matter, we hold the accused guilty of offences punishable under sections 366, 376 and 302 of IPC.

27. Learned Advocate for the accused, on the question of sentence, submitted that the capital punishment imposed by the learned trial Judge is too harsh and he sought our interference on the ground that the accused is a young man having a family to maintain and leniency may be shown to him. In other words, it was his submission that a chance be given to become a reformed member of the society in keeping with the concern for the dignity of human life. Mr Barot, further submitted that this is not a case where the capital punishment could be awarded since it is not a rarest of rare case. He has also submitted that the trial court has been unduly swayed away by the fact that an innocent girl aged 10 years was kidnapped, raped and done to death. Learned APP, Mr R C Kodekar, while supporting the reasons assigned by the trial court, after inviting our attention to certain decisions of the Apex Court, submitted that no leniency is called for in this case. According to the submission of the learned APP, the accused is a sex maniac, who, after having committed rape of the innocent, minor girl, committed murder and to set an example and to have its deterrent effect, no interference by this court is called for as far as the sentence imposed on the accused is concerned. It is further submitted by the learned APP that the learned trial Judge, after having considered the involvement of the accused, not only in one case but in other similar cases, rightly awarded the extreme penalty. According to him, there were no mitigating circumstances and the case was undoubtedly "rarest of the rare" where the sentence of death alone would meet the ends of justice. He, therefore, submitted that the confirmation case be allowed and the appeal preferred by the accused be dismissed.

28. We have carefully considered the rival submissions advanced by the learned Advocates during the course of the hearing. The learned APP has invited our attention to the statement of the accused alleged to have been recorded regarding his family background. From the same it appears that the accused is having a small child and the wife of the accused has remarried no sooner she came to know about his involvement in the offences having been committed by the accused and at present she is staying with the child and her present husband. Father of the accused is being maintained by the other brother of the accused. Thus, the accused, though married, has committed ghastly acts of committing rape and murder of the victims and in almost all cases the victims are girls of tender age and woman of advanced age. The offences committed by the accused are atrocious, disgusting and is

a case of sexual perversity and which leave no room for any leniency.

29. In recent years, the rising crime rate particularly violent crime against women and minor girls has made the criminal sentencing by the courts a subject of concern, though there are admitted disparities. The commission of offences by the present accused repeatedly, was not only inhumane and barbaric but was also totally ruthless crime of rape followed by cold blooded murder and an affront to the human dignity of the society. Thus in our opinion, there are no extenuating or mitigating circumstances whatsoever in the case.

29.1. So far as imposing of sentence and punishments in the absence of specific legislation is concerned, the Apex Court, in the case of Dhjananjoy Chatterjee v. State of West Bengal, reported in 1994 (2) SCC 220, observed that a shockingly large number of criminals go unpunished, thereby increasingly encouraging the criminals and in the ultimate making justice suffer by weakening the system's credibility. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime.The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment".

29.2. A similar view has also been expressed in Ravji v. State of Rajasthan, reported in (1996) 2 SCC 175 wherein it has been held that it is the nature and gravity of the crime and not the criminal, which is germane for consideration of appropriate punishment in a criminal trial. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against an individual victim but also against the society to which the criminal and victim belong.

29.3. In the case of State of M.P. v. Ghanshyam Singh, reported in (2003) 8 SCC 13, the Apex Court observed that the social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money and other offences involving moral turpitude or moral delinquency

which have great impact on social order and public interest cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic a view merely on account of lapse of time in respect of such offences will be resultwise counter-productive in the long run and against societal interest which needs to be cared for and strengthened by a string of deterrence inbuilt in the sentencing system.

30. Lastly, on the question of Penology and sentence, the Apex Court in the case of State of Karnataka v. Puttaraja, (2004) 1 SCC 475 held as under:

> "The object of sentence being to protect the society and to deter the criminal and social impact of the crime and effect of the sentence on the social order are relevant considerations. It is reiterated therein that the protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner stone of the edifice of "order" should meet the challenges confronting the society. Friedman in his "Law in Changing Society" stated that "state of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society."

31. Having discussed the aforesaid circumstances and the resultant effect thereof and the case law, now we may turn our attention to the reasons assigned by the trial court for imposing capital punishment upon the accused. The trial court's reasons are reflected in its judgment. While dealing with the question of sentence, has come to the conclusion that so far as the accused is concerned, he deserves to be awarded capital punishment because the crime committed by him falls in the category of rarest of the rare cases. While holding this, the factors which have mainly weighed with the trial court are that the victim was a helpless minor girl aged 10 years; and the manner in which she was done to death.

32. There have been cases where capital punishment is converted into life imprisonment, and on finishing the term, the released convict commits grave offence of murder of the like. Then, capital punishment may not assure to stop grievous offences but it can surely

refrain one from contemplating them and more so make it tough for the offenders to get away with his crime. Even before completion of the term of life imprisonment, the convict gets furlough leave, parole and can be released on temporary bail on just ground. In that event, where is the guarantee that he will not indulge in similar acts? It is no doubt true that the human life must be valued but not of a human monster, who has got an end of human life of an innocent girl child hardly aged 10 years in a most barbaric manner after committing rape on her.

33. We are therefore, of the opinion that the reasons assigned by the trial court are just and proper and it has not committed any error in awarding capital punishment.

34. Accordingly, we accept reference made by the learned Joint District Judge, 4th Fast Track Court, Anand and confirm the death sentence awarded by him to the accused for the offence under section 302 of IPC and dismiss the appeal filed by the accused against the judgment and order of conviction and sentence passed by the learned Jt.District Judge.

35. Before we conclude and pass final order, we feel that the accused be called and be heard on the question of sentence. Accordingly we have summoned the accused to remain present before us on 2nd March, 2005.

In compliance with the order passed by this court, the accused-Babubhai Udesing Parmar is kept present before this court today. We have heard him on the question of sentence. He has prayed for mercy. He has reiterated the fact that he has a small child and he has to maintain his family. We have already dealt with this fact in the earlier paragraphs of the judgment. Therefore, the facts narrated by him does not deserve any consideration.

We also place our appreciation on record for the valuable assistance rendered by learned APP Mr R C Kodekar for the State of Gujarat and Mr M C Barot, learned Advocate for the accused.

36. Accordingly we accept the reference. We also confirm the death sentence awarded by the learned Joint District Judge, 4th Fast Track Court, Anand to the accused Babubhai Udesingh Parmar in Sessions Case No.298 of 2000 for committing murder of minor girl Savita. As we have confirmed the judgment and order of conviction of death sentence awarded by the learned trial Judge,

obviously the appeal filed by the accused against the said order of conviction and sentence has to be dismissed and accordingly, it is dismissed. The accused is present before the court. He, now, be taken to jail.

Office to furnish certified copies of the judgment of all the matters today.

[Kshitij R Vyas, J.]

[Akshay H Mehta, J.]

msp